

JACK EGNATY, SR.

IBLA 75-649

Decided December 18, 1975

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application F-18192.

Reversed and remanded.

1. Alaska: Native Allotments

Where a Native allotment applicant alleges that he has used the applied for land for hunting and trapping and submits several affidavits for the first time on appeal which verify this use, and the applicant makes a satisfactory showing explaining why he was unable to submit this evidence to the Bureau of Land Management prior to its decision, the case will be remanded to the Bureau for further consideration of the application in light of the new evidence.

APPEARANCES: Donald C. Mitchell and Lewis Schnaper, Esqs., of Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Jack Egnaty, Sr., has appealed from an Alaska State Office, Bureau of Land Management (BLM), decision dated May 30, 1975, which rejected his Native allotment application filed pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repeated by § 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1417 (Supp. III, 1973) and the pertinent regulations, 43 CFR Subpart 2561. The application was rejected for the reason that the field examiner found no cabin

or cache or any other visible evidence of the applicant's use and occupancy of the lands. BLM ruled that the applicant had not occupied the land as contemplated by the Native Allotment Act.

Appellant filed his application dated June 11, 1971, for 160 acres of land located in sections 27 and 34, T. 12 N., R. 41 W., Seward Meridian. He alleged seasonal use of the lands for subsistence trapping and hunting from 1926. He claimed improvements of an old ruined cabin and a cache, both made in 1958.

A field examination was conducted by the BLM in July of 1973. The applicant was not contacted before the examination. The field report indicates that an extensive aerial search for evidence of use and occupancy was conducted by helicopter and on-the-ground investigation. The examiner found no evidence of any use or of any improvements on the parcel, although he concluded "hunting and trapping potential appear to be good in the area. The entire area could be used intermittently for these purposes, which would be in the Native way of life." The examiner determined the applicant's use did not meet the substantial use requirements of the regulations.

On March 27, 1975, the BLM notified appellant of the findings of the field examiner. He was allowed 60 days in which to submit any further evidence in support of his claim. When no further response was received within that period, the decision issued rejecting the application.

[1] Appellant has submitted affidavits from four witnesses on appeal that substantiate his claimed use and occupancy for trapping, hunting, wood gathering, woodcutting, and further verify the existence of the improvements listed in the application. In a letter to the Alaska Legal Services Corporation dated September 24, 1975, the Chief Administrative Judge of the Board of Land Appeals pointed out:

The Board will not give favorable consideration to new or additional evidence submitted with an appeal in the absence of a showing satisfactory to it why the evidence was not submitted to BLM within the 60-day period afforded the applicant to submit a further showing in support of his application. * * *

Appellant has made such a showing. He states that he could not submit these statements to the BLM because the Realty Office of the Bureau of Indian Affairs (BIA) in Bethel, Alaska, was unable to

assist him in gathering the additional information within the 60-day time period afforded by the BLM. He states that a representative of the BIA Realty Office was not able to travel to his village and assist him in obtaining the sworn statements of his witnesses until June 13, 1975. Therefore, his original attorney did not submit them to the BLM in Anchorage because the decision had already issued May 30, 1975.

Since it appears that this appeal is appellant's first opportunity to present this additional information, he was reasonably unable to collect this information without the help of the BIA, and the affidavits were prepared shortly after the 60-day period had lapsed, these affidavits will be accepted as part of the record. The record does not indicate that appellant has been dilatory.

Appellant has requested a hearing on the issue of his use and occupancy. He is not entitled to a hearing as a matter of right inasmuch as the issuance of an allotment is discretionary with the Secretary of the Interior. Beulah Moses, 21 IBLA 157 (1975); Ann McNoise, 20 IBLA 169 (1975). The decision to hold hearings, if there are disputed facts, is also within the Secretary's discretion. Pence v. Morton, Civ. No. A-74-138 (D. Alaska, April 8, 1975), appeal pending. However, in light of the new evidence presented with this appeal which was not available to the BLM during the review of appellant's application, the case will be remanded to that Agency for further consideration on the merits.

It should also be noted that if the Bureau determines that further on-the-ground examination is needed to clarify the record, appellant should be contacted so that he or his designated representative may be given the opportunity to accompany the field examiner during the examination. 1/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

1/ A July 30, 1974, letter from Assistant Secretary Hughes to Roger Lang of the Alaska Federation of Natives sets forth the Department's current procedures stating: "The applicant, the appropriate village council and the appropriate regional corporation will be notified 30 days in advance of planned field examinations. This notification will request the applicant or his designee to be present and accompany the BLM field examiner."

decision appealed from is reversed and remanded to the Bureau of Land Management for further action consistent herewith.

Martin Ritvo
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

